93-476

CASE NO._____

Supreme Court, U.S.
FILED
FEB 26 1992
CLERK

In The
Supreme Court of the United States

OCTOBER TERM 1991

JOHN DANIEL MACLEOD III,
Petitioner,

vs.

EDWARD W. MURRAY,
Director of the Virginia Department of Corrections
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John Daniel MacLeod III, pro se
Bland Correctional Center
Route 2, Box 143
Bland, VA 24315-9615

29 pp

QUESTIONS PRESENTED

(A) Is the exhaustion requirement of 28 U.S.C. §2254(b) an absolute bar to federal appellate review?

(B) Is a petitioner entitled to a complete statement of its opinion from the court of original jurisdiction?

(C) Did the District court give a complete statement of its opinion on the merits of the Petitioner's claim that he was entitled to proceed under the exception to the exhaustion doctrine?

(D) Is the Petitioner, in fact, entitled to proceed under the exception to the exhaustion rule for circumstances rendering the state corrective process ineffective to protect his rights?

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(B) Is a petitioner entitled to a complete statement of its opinion from the court of original jurisdiction?

(C) Did the District court give a complete statement of its opinion on the merits of the Petitioner's claim that he was entitled to proceed under the exception to the exhaustion doctrine?

(D) Is the Petitioner, in fact, entitled to proceed under the exception to the exhaustion rule for circumstances rendering the state corrective process ineffective to protect his rights?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, John Daniel MacLeod III, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on October 22nd, 1991.

I.
OPINION BELOW

The District Court's Order of February 15th, 1991, is attached as Appendix A. The District Court's Order of March 22nd, 1991, is attached as Appendix B. The District Court's Order of May 16th, 1991, is attached as Appendix C. The decision of the Fourth Circuit Court of Appeals dated October 22, 1991, is attached as Appendix D. The Fourth Circuit Court of Appeals decision dated November 29th, 1991, is attached as Appendix E.

II.
JURISDICTION

The Fourth Circuit Court of Appeals denial of the Petition For Rehearing was filed on November 29th, 1991. The original of this Petition was received by the Clerk on February 26, 1992. (See Appendix H). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(i).

III.
CONSTITUTIONAL PROVISIONS INVOLVED

(1) The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(3) The Eighth Amendment of the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(4) Section one (§1) of the Fourteenth Amendment of the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of their liberty, or property without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

IV.
STATUTORY PROVISION INVOLVED

Title 28 U.S.C. §2254(b) provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(Emphasis added to pertinent section)

V.
STATEMENT OF FACTS

Following an unquestionably illegal and void felony conviction in the Circuit Court of the City of Virginia Beach, Virginia on December 13th, 1990, the Petitioner in this matter, knowing himself to be eminently entitled to immediate relief, as at least one of the grievous improprieties surrounding his conviction would preclude any reprosecution, and reasonably apprehending the ultimate futility of obtaining effective relief through the available state review processes, filed, on or about December 22nd, 1990, a petition for a writ of habeas corpus under 28 U.S.C. §2254 with the United States District Court for the Eastern District of Virginia in parallel with his good faith efforts to appeal his conviction through the available state review process.

By order of February 15th, 1991, the District Court directed the Petitioner to show cause why his petition should not be dismissed for want of his having exhausted state remedies and he responded

with a well reasoned answer expounding on his initial claim, that he was entitled to proceed under the exception for "the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

By order of March 22nd, 1991, the District Court responded with a second show cause order comprised mostly of irrelevant exhaustion dogma and responding to the Petitioner's previous response with the single vague statement of its opinion that his initial answer "does not appear persuasive" and again directing that he show cause why his petition should not be dismissed for want of exhaustion.

Once again the Petitioner responded, this time with a seventeen (17) page memorandum setting forth in intimate detail his reasonable grounds for alleging the state review process to be ineffective in his particular case if not, in fact, universally suspect.

By order of May 3rd, 1991, the district court responded by dismissing the Petition, once again citing irrelevant exhaustion dogma and making, as the sole expression of its opinion on the merits of the Petitioner's claim to be entitled to proceed under the exception to the exhaustion rule, the single brief statement that "this response fails to disclose sufficient reason."

An appeal taken thereafter to the Fourth Circuit Court of Appeals was denied without comment on October 22nd, 1991, by which time:

a) Not simply ineffective, as previously alleged, the public defender, who the Petitioner, being denied access to the courts, had been forced to request to represent him on appeal had attempted, without the Petitioner's knowledge or consent and in direct violation of her agreement with him, to railroad his appeal all the way through the Virginia Supreme Court with, ultimately, only one of his numerous grounds preserved.

b) The Petitioner had, with only four (4) days notice, been able to arrest the effort described in a) by filing a Petition For Rehearing in the Virginia Court of Appeals exhibiting newly

discovered irrefutable documentary evidence of an attempt by Common-wealth's Attorney Robert F. McDonnell to cover-up the fact that he had deliberately conspired to deny the Petitioner the speedy trial he had specifically demanded in order to maximize the oppressiveness of the delay to which the Petitioner was especially susceptible, but the Virginia Court of Appeals has twice attempted to avoid having to rule on that Petition by falsely alleging, in violation of it's own rules, that the Petition was filed out of time thereby creating a non-rebuttable presumption of its own prejudice and requiring the Petitioner to file for a writ of mandamus in the Virginia Supreme Court to compel rehearing.

c) As a result of dismissing the public defender, referred to in a) above, the Petitioner had finally obtained his copy of the record and found that it was as he had previously conjectured, hopelessly corrupted and incomplete as, in one instance, no less than seven (7) documents entered in evidence, confirmed to be in evidence or ordered to be incorporated into the record at a single hearing specifically in support of the Petitioner's appeal were found to be missing. All told, the Petitioner estimates that as much as forty percent of the record may be missing and significant discrepancies have been discovered in the trial transcripts, yet despite these corruptions most of the Petitioner's original grounds were still supported, a testament to their veracity, and more were discovered including evidence of previously unsuspected ex parte proceedings.

d) An initial complaint filed with Virginia Attorney General Mary Sue Terry regarding misconduct by Virginia Beach Circuit Court Clerk J. Curtis Fruit had been apparently ignored thereby creating yet another reasonable presumption of prejudice.

A petition for rehearing filed in the Fourth Circuit Court of Appeals was denied, without comment, on November 29th, 1991.

By the time of the filing of this Petition the most flagrant attempt yet to subvert this Petitioner's direct appeal has been perpetrated by the Virginia Supreme Court itself which took up the dismissed public defender's original petition, which it had been

fairly advised had been filed without the Petitioner's knowledge or consent and that said public defender had been specifically directed not to pursue, and attempted to rule on that petition without oral argument in violation of it's own rules thus creating a non-rebuttable presumption of it's own prejudice against this petitoner.

The matter now rests in the state courts on a Petition For Rehearing to force the vacation of that decision and the writ of mandamus filed to compel rehearing in the Virginia Court of Appeals.

VI.
ARGUMENT

a) The exhaustion requirement of 28 U.S.C. is not an absolute bar to federal Appellate review.

The exhaustion requirement was adopted to promote comity with the state courts as well as judicial efficiency in much the same way as interlocutory appeals are now almost universally discouraged when possible. However, it was clearly the intention of the framers to insure that this provision not be abused as a means of denying prompt relief in the true spirit of the "Great Writ" by their inclusion of the exception for "circumstances rendering such process ineffective to protect the rights of the prisoner." In addition to and quite separate and apart from any general defects in the state corrective process for which they had also made exception, thus, even general approval of the state corrective process is not a legitimate consideration in determining eligibility for federal review.

It is, in fact, incumbent upon the federal courts to determine the futility of seeking a state remedy based on the totality of circumstances surrounding each petition as many Circuits have already affirmed in such cases as Simmons v. Reynolds 898 F.2d 865 (2d Cir. 1990, Matlock v. Rose, 731 F.2d 1236 (6th Cir. 1984), Thompson v. Reivit 746 F.2d 397 (7th Cir. 1984), Hawkins v. Higgins, 898 F.2d 1365 (8th Cir. 1990) and Gardener v. Pitchess, 731 F.2d 637 (9th Cir. 1984).

However, one need look no further than this court's own decision in Granberry v. Greer, 481 U.S. 129 (1987) where it flatly stated that "[a]lthough there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to [federal] appellate consideration of his claims.

b) A Petitioner is entitled to a complete statement of opinion in the court of original jurisdiction.

Though summary denial without comment might be allowable on review, a complete statement of the court's opinion is essential in the court of original jurisdiction as was so aptly demonstrated by the presiding judge in Brown v. Booker, 622 F. Supp 993 (E.D.VA. 1985).

c) The district court did not give a complete statement of its opinion on the merits of the Petitioner's claim that he was entitled to proceed under the exception to the exhaustion doctrine.

Exclusive of the irrelevant exhaustion dogma with which the district court orders were embellished, the only true statements of its opinion in response to the Petitioner's claim, that he was entitled to proceed under the exception to the exhaustion doctrine, and twenty pages of well founded argument in support of that claim, were the two vague general statements that "petitioner's answer...does not appear persuasive" and "this response fails to disclose sufficient reason...," which could not possibly have been legitimately construed as reviewable reasoning by the Fourth Circuit Court of Appeals.

d) The Petitioner is, in fact, entitled to proceed under the exception to the exhaustion doctrine for circumstances rendering the state corrective process ineffective to protect his rights.

The fact that this Petitioner was entitled to proceed under the exception to the exhaustion doctrine, reasonably imputable at the time the Petition was filed, is now quite undeniable with both

Virginia courts of review, the only courts jurisdictionally competent to ultimately grant relief through any state review process, having created, by violations of their own rules prejudicial to the Petitioner, non-rebuttable presumptions of their own prejudice towards the Petitioner.

VII.
CONCLUSION

The United States Constitution, a virtual mirror image of the Virginia Constitution from which it was derived, provides, as does its Virginia counterpart, that no person shall be deprived of their liberty without due process of law.

For this Court's edification a copy of the Petition for rehearing which the Virginia Court of Appeals and Supreme Court of Virginia are so desperately attempting to avoid having to acknowledge and address is attached hereto and identified as Appendix F.

Irrespective of any consideration of the fact that the Petitioner is, in fact, innocent of the charge lodged against him or that virtually every one of his relevant constitutionally guaranteed rights and immunities have been grievously violated by the various attorneys, prosecutors, clerks and judges who have acted individually or in concert to insure and preserve his conviction on that charge, the fact remains that the single exhibit attached to the aforementioned Petition for Rehearing, when compared with just what remains of the official record in this matter, provides irrefutable documentary evidence that a citizen of the United States is and has quite literally been held captive without legal excuse or any possibility of future jeopardy since midnight of August 20th, 1990, some eighteen (18) months as of this writing.

Having been fairly advised of that fact hereby, it is incumbent upon this Court to take such action as may be appropriate to liberate that citizen as expeditiously as possible either by assuming control of the matter or further proceedings.

Though a remote possibility still exists that relief might eventually be granted on the state level, this Petitioner believes, as Justice Douglas once stated so succinctly, that "[t]he point of law is clear now and will be no clearer on the remand. ...We should decide the merits here and now."

Respectfully submitted,

/s/

John Daniel MacLeod III
Bland Correctional Center
Route 2, Box 143
Bland, VA 24315-9615

Dated: February 23, 1992

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that a true copy of the foregoing Petition has been mailed to Edward W. Murray at 6900 Atmore Drive, Richmond, VA 23225 on the 24th day of February, 1992.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOHN DANIEL MACLEOD, III
Petitioner,

v. Civil Action No. 91-36-N

FRANK DREW, SHERIFF,
City of Virginia Beach,
Respondent.

ORDER

The Court has received and filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The petition alleges violation of federal rights pertaining to petitioner's convictions on December 12, 1990 in the Circuit Court of the City of Virginia Beach, Virginia for malicious wounding and the use of a firearm while committing a malicious wounding, as a result of which he was sentenced to serve twenty (20) years in the Virginia penal system. Petitioner is currently incarcerated in the Virginia Beach City Jail.

It appearing that the petition designates an extraneous party respondent, it is ORDERED that the petition shall be deemed amended to substitute the sole respondent in this proceeding Frank Drew, Sheriff of the City of Virginia Beach.

The petition indicates that no appeal of the petitioner's conviction was taken to the Supreme Court of Virginia and that no state habeas

corpus petition available under Va. Code Ann. § 8.01-654 to 8.01-668 and § 17-97 (1984 & Supp. 1988) has been filed. It is, therefore, clear that the Supreme Court of Virginia has not ruled upon the merits of petitioner's habeas corpus allegations either by direct appeal or appeal from a trial court's disposition of a habeas corpus application.

Based upon the foregoing, it is clear that there has not been an exhaustion of the state court remedies in conformity with 28 U.S.C. § 2254 (b) and that this court must decline to reach the merits of the petition until the state courts have been afforded full opportunity to consider petitioner's contentions. Petitioner is hereby DIRECTED to show cause why the petition should not be dismissed pursuant to 28 U.S.C. § 2254 (b). Picard v. Connor, 404 U.S. 270 (1971); See Strader v. Allsbrook, 656 F. 2d 67 (4th Cir. 1981).

If this court does not receive from the petitioner within thirty (30) days from the date of this order a written explanation showing why the petition should not be dismissed without prejudice to petitioner's right to further properly proceed in the Virginia state courts, the matter shall be submitted to a United States District Judge for dismissal. For the convenience if petitioner, 28 U.S.C. § 2254 (b) is quoted below.[1]

The Clerk shall forward to the petitioner a copy of this order.

/s/
United States Magistrate Judge

Norfolk, Virginia
February 15, 1991

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[1] 28 U.S.C. § 2254 (b) provides as follows:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOHN DANIEL MACLEOD, III,
Petitioner,

v. Civil Action No. 91-36-N

FRANK DREW, SHERIFF,
City of Virginia Beach,
Respondent.

ORDER

The Court has received and filed a petition for a writ of habeas corpus submitted pursuant to 28 U.S.C. § 2254.

The petition alleges violation of federal rights pertaining to petitioner's convictions on December 12, 1990, in the Circuit Court of the City of Virginia Beach, Virginia for malicious wounding and the use of a firearm while committing a malicious wounding, as a result of which he was sentenced to serve twenty (20) years in the Virginia penal system. Petitioner is currently incarcerated in the Virginia Beach City Jail.

The Court received an Answer from petitioner in response to its Order dated February 15, 1991 ordering petitioner to show cause why his petition for a writ of habeas corpus should not be dismissed for failure to exhaust state court remedies pursuant to 28 U.S.C. § 2254(b). Petitioner complains of his inability to have case materials copied and sent to him; therefore, although the Court does not usually bear the expense of furnishing copies to petitioners, the Court encloses copies of Picard v. Connor, 404 U.S. 270 (1971) and

Strader v. Allsbrook, 656 F. 2d 67 (4th Cir. 1981) for petitioner's review - cases cited in the Court's show cause order of February 15, 1991. In light of these two decisions, petitioner is again DIRECTED to show cause why the petition should not be dismissed pursuant to 28 U.S.C. § 2254 (b).[1] The Court notes that petitioner's Answer to the show cause order does not appear to be persuasive.

If this Court does not receive from petitioner within thirty (30) days from the date of this order a written explanation showing why the petition should not be dismissed without prejudice to petitioner's right to further properly proceed in the Virginia state courts, the matter shall be submitted to a United States District Judge for dismissal.[2]

With regard to petitioner's Request for Appointment of Counsel pursuant to 18 U.S.C. § 3006A (g), the Court DENIES such request.

With regard to petitioner's request for reasonable bond, the Court DENIES such request.

The Clerk shall mail a copy of this order to the petitioner.

/s/
United States Magistrate Judge

Norfolk, Virginia
March 22, 1991

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[1] 28 U.S.C. § 2254 (b) provides as follows:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process of the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

[2] The Court recognizes petitioner's concerns regarding unnecessary delay. However, petitioner is entitled to a full thirty days to respond to this order. If the petitioner responds before the end of the thirty days and does not wish to provide any supplemental answer within the thirty days, he should make such notation on his answer so that his answer may be considered without the Court having to wait until the end of petitioner's time to respond.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOHN DANIEL MACLEOD, III, #183041,
Petitioner,

v. Civil Action No. 91-36-N

EDWARD W. MURRAY,
Director of the Virginia Department of Corrections,
Respondent.

ORDER DISMISSING PETITION

The Court has received a petition for a writ of habeas corpus submitted pursuant to 28 U.S.C. § 2254.

The petition alleges violation of federal rights pertaining to petitioner's convictions on December 12, 1990 in the Circuit Court of the City of Virginia Beach, Virginia for malicious wounding and the use of a firearm while committing a malicious wounding, as a result of which he was sentenced to serve twenty (20) years in the Virginia penal system.

It appears that at the time of the filing of the original petition petitioner was incarcerated in the Virginia Beach City Jail and has now been moved into the state prison system, it is ORDERED that the petition shall be deemed amended to substitute as the sole respondent in this proceeding Edward W. Murray, Director of the Virginia Department of Corrections.

By orders dated February 15, 1991 and March 22, 1991, petitioner was notified that the face of his petition indicates that no

appeal was taken from petitioner's original conviction and that the Supreme Court of Virginia had not yet addressed any habeas corpus petition in this matter under Va. Code Ann § 8.01-654 et seq. and § 17-97. (Copies attached.) It is, therefore, clear that the Supreme Court of Virginia has not ruled upon the merits of petitioner's habeas corpus allegations either on direct appeal or on a state habeas corpus petition. Petitioner was invited to show cause why the petition should not be dismissed pursuant to 28 U.S.C. § 2254 (b).

On April 24, 1991, the Petitioner's Response to Magistrates Second Cause Order was filed. This response fails to disclose sufficient reason as to why this matter has not been appealed to the Supreme Court of Virginia, either by direct appeal or by a state habeas corpus petition.

Based on the foregoing, it is clear that there has not been an exhaustion of state court remedies in conformity with 28 U.S.C. § 2254 (b) and that this Court must decline to reach the merits of the petition until the state courts have been afforded full opportunity to consider petitioner's contentions. See Picard v. Connor, 404 U.S. 270, 275-76 (1971) (holding that "the federal claims must be fairly presented to the state courts"); Strader v. Allsbrook, 656 F. 2d 67, 68 (4th Cir. 1981) (noting that federal courts will refuse to reach the merits of a petitioner's claims before the state courts have had the full opportunity to consider the contentions). (Copies previously furnished.)

It is, therefore, ORDERED that the petition be, and it hereby is, DISMISSED without prejudice to petitioner's right to further properly proceed in the Virginia state courts. See Slayton v. Smith, 404 U.S. 53, 54 (1971). (Copy attached.)

With regard to petitioner's renewed requests for appointment of counsel and reasonable bond, the Courts DENIES such requests.

The petitioner may appeal from the judgment entered pursuant to this Order Dismissing Petition by filing a written notice of appeal with the Clerk of this court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the

date of entry of such judgment. For the reasons above stated, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of probable cause for appeal.

The Clerk shall mail a copy of this order to the petitioner, to the respondent and to the Attorney General of Virginia.

/s/
United States District Judge

Norfolk, Virginia
May 16th, 1991

Order recommended by

/s/
United States Magistrate Judge

May 3, 1991

APPENDIX D

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOHN DANIEL MACLEOD,
PLAINTIFF-APPELLANT,

v.

EDWARD W. MURRAY, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
RESPONDENT-APPELLEE.

No. 91-6078

JOHN DANIEL MACLEOD,
PLAINTIFF-APPELLANT,

v.

EDWARD W. MURRAY, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
RESPONDENT-APPELLEE.

No. 91-6110

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Robert G. Doumar, District Judge.
(CA-91-36-N)

Submitted: September 30, 1991

Decided: October 22, 1991

Before HALL and PHILLIPS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

No. 91-6078 dismissed and No. 91-6110 affirmed by unpublished per curiam opinion.

COUNSEL

John Daniel MacLeod, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

In No. 91-6078, John Daniel MacLeod seeks to appeal the district court's order refusing habeas corpus relief pursuant to 28 U.S.C. § 2254. Our review of the record and the district court's opinion accepting the recommendation of the magistrate judge discloses that this appeal is without merit. Accordingly, we deny a certificate of probably cause to appeal and dismiss the appeal on the reasoning of the district court. *MacLeod v. Murray*, CA-91-36-N (E.D. Va. May 16, 1991). In No. 91-6110, MacLeod appeals from the district court's denial of his post-judgment motion for recusal. We also affirm that order on the reasoning of the district court. *MacLeod v. Murray*, CA-91-36-N (E.D. Va. Jul. 8, 1991). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

No. 91-6078, *DISMISSED*

No. 91-6110, *AFFIRMED*

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 29, 1991

No. 91-6078
CA-91-36-N

JOHN DANIEL MACLEOD
Petitioner - Appellant

v.

EDWARD W. MURRAY, Director of the
Virginia Department of Corrections
Respondent - Appellee

No. 91-6110
CA-91-36-N

JOHN DANIEL MACLEOD
Plaintiff - Appellant

v.

EDWARD W. MURRAY, Director of the
Virginia Department of Corrections
Defendant - Appellee

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
John M. Greacen, Clerk

Appendix F

VIRGINIA: IN THE COURT OF APPEALS OF VIRGINIA

John Daniel MacLeod, III, Appellant, v. Commonwealth of Virginia, Appellee.	Record No. 2063-90-1 Circuit Court No. CR90-260

PETITION FOR REHEARING

COMES NOW the Appellant, John Daniel MacLeod, III, and upon receipt, on August 10th, 1991, of a copy of a decision of the aforesaid Court denying a petition for appeal filed in this matter, having once again found himself ambushed in his attempts to exonerate himself in this matter states as follows:

1. That the Petition for Appeal upon which the Court has ruled fails to allege numerous grounds upon which the Appellant is entitled to relief, fails to accurately or effectively argue the proper grounds alleged, improperly alleges a false and contradictory ground prejudicial to the Appellant, was prepared without conferring with the Appellant by a public Defender who was assigned after the trial and has no personal knowledge of the trial and it's incidents, and was filed in direct violation of the Appellants agreement with said Public Defender that he would be allowed to review and amend the Petition before it was filed.

2. That the Appellant only became aware of the filing of the petition ruled upon on or about June 28th, of this year and was in the process of preparing a notice dismissing the aforesaid public

defender and a Petition to this court requesting that said public defender's petition be withdrawn and the court allow the filing of a belated appeal when, as stated, he was surprised by receipt of a copy of the Court's decision four (4) days ago.

3. That, though he will proceed to officially notify Ms. Berry of her dismissal, of which this court is hereby notified, he has suspended his plans to request a belated appeal as he finds that, by way of this petition for rehearing, the court has an opportunity to bring the charade of the Appellant's, hereinafter referred to as the Defendant, illegal and void conviction to an end in reasonably short order and can do so by the consideration of a single exhibit attached hereto and identified as Petitioner's exhibit A.

Taken at face value this notice would be concrete evidence of the Commonwealth's failure to meet its obligation to bring the Defendant to trial within the time frame allowed by statute as it alleges that the actual trial date of December 11th, 1990, has already been set by April 16th, of 1990, fully eight (8) months in advance in apparent response to Mr. Broccoletti's alleged notice of his intention to request that the Defendant be evaluated pursuant to 19.2-169.1. Even if it were conceded, which it is not, that the entire period between April 4th, and July 23rd, is chargeable against the Defendant the Commonwealth can not possibly claim to have anticipated the evaluation spontaneously ordered on the court's own motion by Judge Owen on the 20th of August nor can the Commonwealth claim that said evaluation or any motion hearings, which are anticipated in the time frame mandated by statute, could possibly have affected a trial date which had already been set and upon which date the trial did, in fact, take place as allegedly scheduled.

Therefore, under this scenario, as the Commonwealth has conceded seventy-two (72) days between January 22nd, 1990, and April 4th, 1990, and can claim no legitimate credit for the one-hundred and forty-one (141) days between July 23, 1990, the Commonwealth failed to bring the Defendant to trial for two-

hundred and thirteen (213) days, sixty-one (61) days in excess of the statutory limit and would have been in default by twelve (12) days when the Defendant properly moved for dismissal on October 23rd, 1990.

The scenario advanced above, however, is just that as should be apparent from the record, no matter how much it may have been corrupted, as the attached notice could not possibly have been prepared on April 16th, 1990, which is, incidentally, the date on which Dr. Faber's contrived recommendation that the Defendant be evaluated was issued, when at least one trial date of August 20th, 1990 was set and witnesses were subpoenaed between then and December 11th, 1990.

The attached notice was, in fact, prepared by Mr. McDonnell, on or about October 27th, 1990, four days after the Defendant introduced his Motion to Dismiss on October 23rd, 1990, and was planted in the Defendant's files by stapling it to the back of some other routine notices, as part of an illconsidered spur of the moment scheme to justify the delay in bringing the Defendant to trial and clearly evidences Mr. McDonnell's awareness of the Commonwealth's wrongdoing.

In brief, what had actually occurred was that the Commonwealth, through various agents, having developed a dedication to obtaining a felony conviction, for reasons as yet to be revealed, on a charge and evidence for which they knew full well one was not justified, and knowing that the Defendant was especially vulnerable to oppression as a result of any delay, deliberately conspired with the Defendant's retained attorney turned advisory counsel to effect just such a delay by concurring in a motion based on a contrived recommendation that the Defendant's competency be evaluated when, in fact, he had and they were fully aware, already been found competent by the same Doctor and met no criteria for incompetence. As detailed in the Defendant's motion to dismiss, Dr. Miller Ryans was recruited to assist in this effort but not until after he had threatened to return the Defendant, who obviously was not and

would never be found incompetent, to trial court if someone didn't explain why he had been sent to Central State.

At a status hearing, which the Commonwealth now attempts to allege was a competency hearing but the statute contemplates only when one or the other party attends to allege that incompetence has been shown, Mr. Broccoletti inadvertently admitted in his opening statements that the Defendant had "as expected" been found competent.

The Commonwealth did not, in fact, claim credit for the delay caused by that hearing, held on July 23rd, 1990, as closely tracked by computer as the Defendant is given to understand, they did not include it in a calculation which the Commonwealth is now careful to avoid, which is that when the Defendant was finally brought to trial on August 20th, 1990, two-hundred and ten days (210) had elapsed of which only twenty-eight (28) for the initial continuance that the Defendant had aquiesed to and thirty (30) days allowable by statute for evaluation were legitimately chargeable to the Defendant leaving one-hundred and fifty-two days, the statutory limit.

The Commonwealth had in fact deliberately brought the Defendant to trial on the last possible day which they could legally do so for the sole purpose of maximizing the oppressiveness of the delay to the Defendant's prejudice and sat mute when Judge Owen unexpectedly employed the same tactic forever forfeited the right to prosecute the Defendant.

The Defendant is not guilty of the offense charged and is eminently entitled to relief which the court is able to, and should, bestow by immediately ordering, pursuant to Rule 5A:13 (c), that the Defendant's conviction be dismissed with prejudice.

I hereby certify under penalty of perjury that the statements contained herein are true and correct and the exhibit attached is authentic.

/s/

John Daniel MacLeod, III

Appendix G

COMMONWEALTH OF VIRGINIA
Office of the Commonwealth's Attorney
City of Virginia Beach
Municipal Center
Virginia Beach, Virginia 23456-9050
(804) 427-4401

Robert J. Humphreys
Commonwealth's Attorney

April 16, 1990

J. Curtis Fruit, Clerk
Circuit Court
Municipal Center
Virginia Beach, VA 23456

RE: Commonwealth v. John Daniel MacLeod, III
Docket # CR90-0260
Trial Date: December 11, 1990

Dear Mr. Fruit:
Please be advised that the Commonwealth requests a jury trial in the above captioned matter.

Very Truly yours,
Robert F. McDonnell
Assistant Commonwealth's Attorney

RFM/djb
cc:
James O. Broccoletti, Esquire
6663 Stoney Point South
Norfolk, VA 23502

John Daniel MacLeod, III
c/o Virginia Beach Correctional Center Municipal Center
Virginia Beach, VA 23456

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 28, 1992

John D. MacLeod, III, #183041
Bland Correctional Center
Route 2, Box 143
Bland, Virginia 24315-9615

RE: MacLeod v. Murray

Dear Mr. MacLeod:

The above-entitled petition for a writ of certiorari was received February 26, 1992. The papers are returned for the following reason(s):

Please see Rule 33 in regard to printing requirements. Please send this office 40 copies of your petition and your church for $300.00.

Very truly yours,

In Forma Pauperis Department
(202) 479-3019

Enclosures